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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6290

GLEN D. DUPRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42(3), the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, moves the Court for leave to file the attached brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari in the above-captioned case. The respondent United States has consented to the filing of this brief; the petitioner, Glen D. DuPris, has refused so to consent.

The Cheyenne River Sioux Tribe is a fedeally recognized Indian tribe which governs its members on a

reservation that in part has been opened to settlement by non-Indians under the Act of May 29, 1908, 35 Stat. 460. The 1908 Act was one of a series of so-called "surplus lands" statutes which were enacted by Congress at the turn of the twentieth century without the consent of the affected Indian tribes, and which opened all or parts of the tribes' reservations to non-Indian settlement. Without exception those areas previously opened to settlement by the 1908 legislation have been recognized and consistently administered by the federal government and the Tribe as part of the Cheyenne River Reservation.

This case presents a specific issue of great and continuing concern to the Cheyenne River Sioux Tribe—namely, whether the 1908 Act effected a termination of the reservation status of the western half of the Cheyenne River Reservation. If the decision of the Court of Appeals that the 1908 legislation did not disestablish any portion of the Reservation does not stand, consequences for *amicus curiae* and its members will be undeniably revolutionary. Specifically, the federal government no longer will possess exclusive jurisdiction over members of the Tribe who reside in the area of the Reservation opened to non-Indian settlement by the 1908 Act. Moreover, the Tribe's ability to exercise effectively its traditional powers of self-government will be severely curtailed.

This result inevitably will occur because, as was the case at the time the 1908 statute was enacted, much of the Tribe's cultural and political life is centered in that portion of the Reservation affected by the 1908 Act. When Congress passed the legislation, fully 55 percent of all allotments which had been made to Tribal members were located in the opened area—a Tribal presence which has remained to this day. Specifically,

over 50 percent of the present population in the Reservation portions of both Dewey and Ziebach Counties, South Dakota, which are the areas affected by the 1908 Act, is enrolled as members of the Tribe. More important, almost 80 percent of the Tribe's total membership resides in the opened portion of the Reservation.

The Cheyenne River Sioux Tribe submits the attached brief in order to assist the Court in recognizing that the Court of Appeals correctly applied the principles of construction established by this Court for interpreting surplus lands legislation such as the 1908 Act. Since these points are not likely to be covered—or to be approached in identical fashion—in the brief submitted by respondent United States, and since the Tribe's discussion thus may be helpful to the Court, the Cheyenne River Sioux Tribe requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

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May 13, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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GLEN D. DUPRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA IN OPPOSITION TO THE PETITION FOR A WRIT CF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Cheyenne River Sioux Tribe is a federally recognized Indian tribe which governs its members on a reservation that in part has been opened to settlement by non-Indians under the Act of May 29, 1908, 35 Stat. 460. The 1908 Act was one of a series of so-called "surplus lands" statutes which were enacted by Congress at the turn of the twentieth century without the consent of the affected Indian tribes, and which opened all or parts of the tribes' reservations to non-Indian settlement. Without exception those areas previously opened to

settlement by the 1908 legislation have been recognized and consistently administered by the federal government and the Tribe as part of the Cheyenne River Reservation.

This case presents a specific issue of great and continuing concern to the Cheyenne River Sioux Tribe—namely, whether the 1908 Act effected a termination of the reservation status of the western half of the Cheyenne River Reservation. If the decision of the Court of Appeals that the 1908 legislation did not disestablish any portion of the Reservation does not stand, the consequences for *amicus curiae* and its members will be undeniably revolutionary. Specifically, the federal government no longer will possess exclusive jurisdiction over members of the Tribe who reside in the area of the Reservation opened to non-Indian settlement by the 1908 Act. Moreover, the Tribe's ability to exercise effectively its traditional powers of self-government will be severely curtailed.

This result inevitably will occur because, as was the case at the time the 1908 statute was enacted, much of the Tribe's cultural and political life is centered in that portion of the Reservation affected by the 1908 Act. When Congress passed the legislation, fully 55 percent of all allotments which had been made to Tribal members were located in the opened area—a Tribal presence which has remained to this day. Specifically, over 50 percent of the present population in the Reservation areas of both Dewey and Ziebach Counties, South Dakota, which are the areas affected by the 1908 Act, is enrolled as members of the Tribe. *See generally* Government Exhibit Nos. I, II. More important, almost 80 percent of the Tribe's total membership resides in the opened portion of the Reservation. *See generally* Government Exhibit Nos. I, II.

The Cheyenne River Sioux Tribe submits the following brief in order to assist the Court in recognizing that the Court of Appeals correctly applied the principles of construction established by this Court for interpreting surplus lands legislation such as the 1908 Act.[1]

STATEMENT OF THE CASE

The relevant facts, which have been set forth in greater detail in the brief filed by respondent United States, can be summarized in the following manner. On December 23, 1976, defendant, a juvenile and a member of the Cheyenne River Sioux Tribe, allegedly committed burglary and larceny in a clothing store in Eagle Butte, South Dakota. The commercial establishment in which the foregoing events occurred is on fee patent land located in that portion of the Cheyenne River Reservation, as established and defined by the Act of March 2, 1889, 25 Stat. 888, which was opened to non-Indian settlement pursuant to the Act of May 29, 1908, 35 Stat. 460.

On June 1, 1977, the United States filed in the District Court below an Information charging defendant with two violations of the Major Crimes Act, 18 U.S.C. § 1153.

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[1] The Cheyenne River Sioux Tribe is aware that in *Stankey v. Waddell*, 256 N.W.2d 117 (S.D. 1977), the South Dakota supreme court, based upon its reading of *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kreip*, 430 U.S. 584 (1977), reached a contrary decision concerning the effect of the 1908 legislation. That state court's opinion, however, obviously was rendered prior to the Eighth Circuit's consideration here of its previous ruling in *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1975). The *amicus curiae* assumes that, in light of the Eighth Circuit's decision in this case on what is clearly an issue of federal Indian law, the South Dakota supreme court, if confronted with the question again, will follow the Court of Appeal's lead. In any event, no reason exists at the present time to assume otherwise.

The United States stated in its Information that the alleged crimes took place within the boundaries of the Cheyenne River Reservation, and that they were, therefore, subject to federal jurisdiction under 18 U.S.C. § 1153.

On October 5, 1977, defendant filed a Motion to Dismiss the Information which asserted the absence of federal jurisdiction. Specifically, defendant argued that the 1908 Act had removed from the Cheyenne River Reservation those lands on which the alleged crimes took place, and thus ousted the United States of any criminal jurisdiction over defendant. On June 29, 1978, the District Court filed an Order and accompanying Memorandum Opinion granting defendant's Motion to Dismiss the Information.

The United States filed a timely Notice of Appeal on July 28, 1978. Following argument the appeal was submitted on December 11, 1978. The Court of Appeals rendered a decision on November 27, 1979, which reversed the judgment of the District Court and reaffirmed the Eighth Circuit's earlier holding in *United States ex rel. Condon v. Erickson,* 478 F.2d 684 (8th Cir. 1973), that the Act of May 29, 1908, did not terminate the reservation status of any portion of the Cheyenne River Reservation. On December 21, 1979, defendant DuPris filed a Petition for Rehearing with Suggestion that Rehearing be *En Banc,* which Petition was dismissed by the Court of Appeals with prejudice on January 18, 1980.

The defendant DuPris filed in the Supreme Court on February 19, 1980, a motion for an extension of time in which to file a Petition for a Writ of Certiorari to review the decision of the Court of Appeals. The Court granted defendant's motion by order dated February 21,

1980, without prejudice to the question whether DuPris' application was made in timely fashion. The defendant filed his Petition for a Writ of Certiorari with the Court on March 20, 1980.

REASONS FOR NOT GRANTING THE WRIT

A. The United States Attorney for the State of South Dakota has moved in the District Court to Dismiss the Information against petitioner DuPris, and the petition for a writ of certiorari, therefore, should be denied.

In the period immediately preceding the filing of this brief, *amicus curiae* learned that the United States Attorney for the State of South Dakota apparently has filed in the District Court a motion to dismiss with prejudice the information against petitioner DuPris. While the Cheyenne River Sioux Tribe is not privy to the specific reasons for dismissal, it assumes that the details of this recent development will be discussed in the brief submitted by the United States.

Should the Information be dismissed with prejudice, a denial of the petition for a writ of certiorari would be appropriate. The Supreme Court consistently has adhered to a general policy which eschews reviewing cases where the threat to a petitioner is hypothetical and not real. *Cf. Ellis v. Dyson,* 421 U.S. 426 (1975); *Linda R.S. v. Richard D.,* 410 U.S. 614 (1973); *Younger v. Harris,* 401 U.S. 37 (1971); *Golden v. Zwickler,* 394 U.S. 103 (1969); *Bailey v. Patterson,* 369 U.S. 31 (1962); *see generally Poe v. Ullman,* 367 U.S. 497 (1961).

B. This case is not appropriate for review by the Supreme Court because it does not raise questions concerning what fundamental standards are to be applied to determine the jurisdictional effect of Indian surplus lands legislation, or whether those criteria which have been developed by the Supreme Court over the past two decades were utilized by the Court of Appeals below.

The Supreme Court is no stranger to cases which raise an issue of disestablishment as it relates to federal statutes enacted in the early twentieth century which opened all or portions of Indian reservations to non-Indian settlement. Specifically, during the past twenty years the Court has considered four such cases—three of which have been reviewed within the past ten years. *See Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977); *DeCoteau v. District County Court,* 420 U.S. 425 (1975); *Mattz v. Arnett,* 412 U.S. 481 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962). These decisions set forth very clearly the legal standards which are to be applied in addressing a disestablishment question.

In its *Seymour* and *Mattz* opinions, the Supreme Court emphasized, as it had held previously in *United States v. Celestine,* 215 U.S. 278 (1909), that "'when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.'" *Mattz v. Arnett,* 412 U.S. at 504-05; *Seymour v. Superintendent,* 368 U.S. at 359. The Court also stated that, to effect the disestablishment of reservation lands, a "congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett,* 412

U.S. at 505. Moreover, the fact that Congress chose to open Indian lands to non-Indian settlement does not mean in itself that a reduction of reservation boundaries was intended. *Id.* at 496-97. Finally, as a backdrop for its *Seymour* and *Mattz* opinions, the Court relied upon the established principle of Indian law that ambiguities arising in statutes affecting Indian tribes should be resolved in their favor. *Seymour v. Superintendent,* 368 U.S. at 356 n.12.

In *DeCoteau v. District County Court,* 420 U.S. 425 (1975), and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), the Supreme Court utilized precisely the same principles which had served as the basis for its *Seymour* and *Mattz* decisions:

> This Court does not lightly conclude that an Indian Reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." [Citation omitted.] The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation.'" [Citations omitted.] Accordingly, the Court requires that the "congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." [Citations omitted.] In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit. [Citation omitted.]

DeCoteau v. District County Court, 420 U.S. at 444. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 586-87.

Based upon significantly varying facts, the Supreme Court reached different results in applying the relevant legal rules in the foregoing cases. Thus, in its *DeCoteau* and *Rosebud* decisions, the Court held that the federal statutes at issue had terminated the reservation status of affected areas, while in the *Seymour* and *Mattz* cases an opposite conclusion was reached.

As the Court well knows, the Eighth Circuit also is not a stranger to the disestablishment issue, and, based upon the standards which have been established and reaffirmed over the years by the Supreme Court, that Court of Appeals has analyzed the surplus lands legislation relating to a number of Indian tribes within its Circuit and has reached different legal results in light of varying factual patterns. *Compare United States v. Long Elk*, 565 F.2d 1032 (8th Cir. 1977); *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), *with United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975); *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975). This Court is aware, of course, that in the *Rosebud Sioux Tribe* case the Eighth Circuit concluded, just as the Supreme Court later did, that the 1904, 1907, and 1910 Acts at issue there did terminate the reservation status of affected Indian lands. Moreover, as its opinion in *United States v. Long Elk*, 565 F.2d 1032 (8th Cir. 1977), indicates, the Eighth Circuit has applied the analysis reaffirmed in the *DeCoteau* and *Rosebud Sioux Tribe* cases in a conscientious, scholarly, and detailed fashion to the disestablishment questions coming before it.

No basis exists for believing that the Eighth Circuit did anything other than the foregoing in considering

petitioner DuPris' case below. Here the Court of Appeals was required to consider again its prior decision in *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (8th Cir. 1973), that the 1908 Act did not disestablish any portion of the Cheyenne River Reservation—a judgment, significantly, which already had been cited favorably by this Court in its *Mattz* opinion. *See Mattz v. Arnett*, 412 U.S. at 505 n.23. After reviewing the question in light of the Supreme Court's numerous decisions on the general subject, including the *Rosebud Sioux Tribe* opinion (*United States v. DuPris*, 612 F.2d 319, 321-23 (8th Cir. 1979)), the Court of Appeals concluded that nothing in the 1908 Act or its legislative history evinced a clear intent on the part of Congress to terminate the reservation status of Indian lands affected by that legislation.

The *amicus curiae* Cheyenne River Sioux Tribe believes that the result below is fully consistent with the Tribe's current presence in the opened portion of the Reservation. The Tribe still represents a majority of the total population in that area, and a vast majority of its members reside there. Furthermore, the Tribe's economy is centered in the opened portion of the Reservation, and, of both symbolic and actual significance, its seat of government is located there.

In light of the foregoing, Supreme Court review of the petitioner's case seems an unjustified expenditure of this Court's resources. The Supreme Court has established the guidelines for disestablishment cases, which historically the Eighth Circuit has applied with diligence. In applying those standards to the present case, the Court of Appeals concluded, as it first did nearly a decade ago, that the lands opened by the 1908 Act remain a part of the Cheyenne River Reservation—a result which

comports fully with the extent of Tribal life in that area in 1980.

C. The Court of Appeals' decision below is correct because, under the rules of interpretation established by this Court, neither the 1908 Act nor its legislative history contain clear indicia that Congress intended disestablishment.

Apart from the more general question whether Supreme Court review of petitioner's case is justified in light of this Court's and the Eighth Circuit's historically extensive and consistent treatment of the legal guidelines relating to disestablishment, a brief review of the 1908 Act and its legislative history indicates that the Court of Appeals' decision below was demonstrably correct. In short, the foregoing materials do not contain the clear indicia of disestablishment which the Supreme Court found in the *DeCoteau* and *Rosebud Sioux Tribe* cases.

1. *The face of the 1908 Act does not reflect an explicit Congressional intent to effect the disestablishment of any portion of the Cheyenne River Reservation.*

An analysis of the face of the 1908 Act belies petitioner's argument that the legislation reflects an explicit intent on the part of Congress to reduce the boundaries of the Cheyenne River Reservation:

a. No "agreement," bilateral or otherwise, serves as the backdrop for the 1908 Act. In both the *DeCoteau* and *Rosebud Sioux Tribe* cases this "unmistakable base line premise of disestablishment" (*Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 592) did exist, and the Court attached great significance to it. *Rosebud Sioux Tribe*

v. Kneip, 430 U.S. at 592; *DeCoteau v. District County Court*, 420 U.S. at 445.

b. Section 1 of the 1908 Act provided only that a specified portion of the Cheyenne River and Standing Rock Reservations shall be "opened."[2] 35 Stat. at 460. The foregoing language contrasts starkly to the parallel explicit provisions of cession contained in the 1901 Agreement and the 1904 Act construed by the Supreme Court in the *Rosebud Sioux Tribe* case. Indeed, the word "cede" does not appear once in the entirety of the 1908 legislation. *Compare United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975).[3]

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[2]The 1907 and 1910 Acts construed in the *Rosebud Sioux Tribe* case also contained this operative language, but there the Court interpreted the foregoing statutes by reference to the 1901 Agreement and the 1904 legislation—both of which, as explained below, contained explicit cession language:

> Having determined that the 1904 Act carried forth the intent to disestablish which was unquestionably manifested in the 1901 Agreement, our examination of the 1907 and 1910 Acts is made easier.
>
> * * *
>
> *The 1907 and 1910 Acts must be considered in context, and an important part of that context is the 1901 Agreement and the 1904 Act.* [Emphasis added.]

Rosebud Sioux Tribe v. Kneip, 430 U.S. at 606 n.30. Furthermore, section 1 of the 1910 Act makes explicit reference to the "tract to be ceded". Act of May 30, 1910, 36 Stat. 448. *Cf. United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975).

[3]The presidential proclamation implementing the 1908 Act also is free from any language of cession. *See* Proclamation of August 19, 1909, 35 Stat. 2500. The foregoing stands in sharp contrast to the proclamation issued on the heels of the 1904 legislation construed in the *Rosebud Sioux Tribe* case. The latter proclamation contained language of cession and amounted, in this Court's view, to an "unambiguous, contemporaneous statement,

[footnote continued]

c. Section 1 of the 1908 statute also authorized the Secretary of the Interior to reserve lands in the opened area for agency, school, and religious purposes. 35 Stat. at 461. This language would seem incongruous if the statute removed all surrounding areas from reservation status and restored them to the public domain. Significantly, the 1904 and 1907 statutes construed in the *Rosebud Sioux Tribe* case did not contain the foregoing provision.

d. Section 2 of the 1908 Act contained a provision which reserved to the Tribe all lands in the opened area which were found to have mineral value. 35 Stat. at 462. That Congress would have reserved minerals to the Tribe in the first instance and then proceeded to terminate that same portion of the reservation by opening a small quantity of surplus land to non-Indian settlement seems highly improbable. Significantly, the aforementioned provision was absent from the legislation construed in the *DeCoteau* and *Rosebud Sioux Tribe* cases, but has been present in other surplus lands legislation which has been interpreted by courts not to effect disestablishment. *See, e.g., City of New Town v. United States,* 454 F:2d 121 (8th Cir. 1972) (Act of June 1, 1910, 36 Stat. 455).

Furthermore, even those provisions in the 1908 Act which are relied upon by petitioner and the *amici curiae* supporting him do not show persuasively that Congress intended a reduction of reservation boundaries:

a. The reference in section 2 of the legislation to the "diminished" portion of the reservation is ambiguous, as the Court of Appeals below emphasized the first time it considered the 1908 Act. *See United States ex rel.*

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by the Nation's Chief Executive, of a perceived disestablishment of Gregory County." *Rosebud Sioux Tribe v. Kneip,* 430 U.S. at 602-03.

Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973). Although the reference could be interpreted to mean disestablishment, the term also may have meant "diminished" only in the sense that lands within the exterior boundaries of the reservation were being opened to purchase by outsiders.

b. Section 1 of the 1908 Act does contain a provision reserving specified sections of land for state school purposes, which the Supreme Court construed in its *Rosebud Sioux Tribe* opinion to be a factor in support of a finding of disestablishment. In light, however, of the provision—discussed above—in the same section which authorizes the Secretary of the Interior to set aside lands in the opened portion of the Reservation for purely *Tribal* educational purposes, the state school lands provision does not have nearly the same force here that it did in the *Rosebud Sioux Tribe* decision. Furthermore, the Supreme Court indicated in its *DeCoteau* decision that, among the various statutory indicia of disestablishment, the state school lands provision which appeared frequently in surplus lands legislation is not especially persuasive one way or the other. *DeCoteau v. District County Court,* 420 U.S. at 445 n.33.

c. Finally, the provision prohibiting the sale of liquor which was added to the 1908 legislation by the Act of February 17, 1910, 36 Stat. 196, does not represent convincing evidence that Congress intended to terminate the reservation status of lands opened in 1908. To the extent such a provision was unnecessary with respect to areas already in reservation status, Congress' failure to include the provision in the original 1908 Act is implicit evidence that disestablishment was not intended.

Furthermore, a report on other legislation proposed in 1910 which related to the Cheyenne River Reservation, and which contained a liquor provision identical to the foregoing, indicates that such a provision was sought by *Tribal members* with respect to the *entire* reservation rather than merely the opened portion. *See* S. Rept. No. 518, 61st Cong., 2d Sess. 4 (1910) (Letter of April 5, 1910 from Secretary of the Interior to Chairman of the Senate Committee on Indian Affairs). The report reflects confusion on the part of the Secretary of the Interior about the state of federal liquor laws in reservation areas, but it does little to advance the inquiry about whether the Congress considered opened portions of the Reservation to be disestablished.

2. *The legislative history of the 1908 Act does not evince a clear Congressional intent to disestablish any portion of the Cheyenne River Reservation.*

Beyond the language which appears on the face of the 1908 Act, the legislative history also is unpersuasive that Congress intended disestablishment. As the discussion below will show, the foregoing materials do not satisfy this Court's requirement that a "congressional determination to terminate must . . . be clear from the . . . legislative history" (*Mattz v. Arnett*, 412 U.S. at 505):

a. The limited Congressional debate on the 1908 legislation, which took place only in the House of Representatives, contains no explicit or implicit support for a finding of disestablishment. The terms "cede" or "cesssion," or, for that matter, any of the other words courts have found in various contexts to be indicative of disestablishment, such as "reduce," "relinquish," or "diminish," appear nowhere in the debate.

b. The Congressional reports on the legislation which became the 1908 Act also lack conspicuously any compelling evidence that disestablishment was intended. *See generally* S. Rept. No. 439, 60th Cong., 1st Sess. (1908); H.R. Rept. No. 1539, 60th Cong., 1st Sess. (1908). The references to merely "opening" the Indian lands subject to the legislation are many (*see* Rept. No. 439, 60th Cong., 1st Sess. 4 (1908); H.R. Rept. No. 1539, 60th Cong., 1st Sess. 2 (1908)), but nowhere in the Committee narratives do the words "cede" or "cession" appear even once. The absence of such terms here contrasts sharply to the abundance of such references in parallel Congressional materials relating to the statutes construed in the *Rosebud Sioux Tribe* case. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 595.[4]

3. *The subsequent jurisdictional treatment of those portions of the Cheyenne River Reservation which were opened by the 1908 Act provides no persuasive evidence that Congress intended the disestablishment of affected Tribal lands.*

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[4] In support of their position petitioner and *amici curiae* supporting him do make reference to the phrase "reservations as diminished" which appears in the Senate report on the bill which became the 1908 Act. *See* S. Rept. No. 439, 60th Cong., 1st Sess. 4 (1908). This term, of course, is subject to the ambiguity pointed out above and explained in the Eighth Circuit's decision in *United States ex rel. Condon v. Erickson*. *See* text *supra*, at 16-17. Moreover, read in *pari materia* with the preceding four sentences, the report language relied upon by petitioner clearly is susceptible to the inference that the Senate merely was making reference to that portion of the Reservation which was to be left in an *unopened* state rather than to the lands which were to remain in reservation status.

In their brief in support of petitioner, the *amici curiae* concede that "the delineation of jurisdiction during the early years immediately following the opening of the area in 1909 is somewhat unclear." Brief for the State of South Dakota, *et al.*, at 13. The foregoing concession is well-advised since the instances, subsequent to the 1908 Act, in which the Congress and various federal administrative agencies treated the opened area as a continuing part of the Reservation are legion.[5]

Furthermore, *amicus curiae* Cheyenne River Sioux Tribe takes explicit and categorical exception to the assertions of *amici curiae* supporting petitioner that the State of South Dakota exercised unchallenged jurisdiction over the non-trust portions of the opened area of the Reservation between the years 1910 and 1973. The only conceivable support for the foregoing statement in the record is the obviously self-serving testimony offered in the District Court below by the State's Attorney for Dewey County. Despite the District Court's apparent receptivity to the testimony of the State's Attorney, the Court denied the United States the opportunity to adduce evidence on the same question.

CONCLUSION

After the final sentence of the legislative materials relating to the 1908 Act has been analyzed, this case plainly and simply is not *DeCoteau v. District County Court* or *Rosebud Sioux Tribe v. Kneip*. In contrast to the statutes construed in both the foregoing decisions,

[5] *See, e.g.*, Act of August 11, 1964, Pub. L. No. 88-418, 78 Stat. 389; Act of September 30, 1950, 64 Stat. 1094; Act of March 4, 1921, 41 Stat. 1446; Act of May 28, 1914, 38 Stat. 383; Act of June 23, 1910, 36 Stat. 602; 40 I.D. 56 (1910); 38 I.D. 160 (1909).

here Congress nowhere utilized explicit and unmistakable language of cession. The legislative record does not bespeak disestablishment with anything approaching the clarity which the Supreme Court found in the *DeCoteau* and *Rosebud Sioux Tribe* cases. Indeed, on balance the Congressional materials support only the proposition that Congress wished to "open" a portion of the Cheyenne River Reservation, which this Court repeatedly has emphasized is completely consistent with continued reservation status.

Furthermore, the Cheyenne River Sioux have an entirely legitimate expectation that their reservation located in Dewey and Ziebach Counties will continue to be honored and respected, as it has been generally for the more than seventy years since 1908. The population in the opened portion of the Reservation is still predominantly Indian, and, more important, the vast majority of members of the Tribe reside there. The Tribe and its individual members still have substantial land holdings in the 1908 area—just as they did at the time those lands were opened.

For all the aforementioned reasons, the *amicus curiae* Cheyenne River Sioux Tribe believes the judgment of the Court of Appeals below is entirely consonant with the prior decisions of the Supreme Court, and, accordingly, the Tribe respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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